



# California Regional Water Quality Control Board

## San Francisco Bay Region



Terry Tamminen  
Secretary for  
Environmental  
Protection

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Arnold Schwarzenegger  
Governor

Date: JUN 24 2004  
File Nos. 2118.03/2119.1242 (ECM)  
Site No. 02-07-C0108

***Via Certified Mail No.***

70033110000265558912

Mr. Michael Olson  
Orinda Gateway LLC (d.b.a. Montanera, LLC)  
232 Brookwood  
Orinda, CA 94563

**Subject: Transmittal of Order No. R2-2004-0049, Waste Discharge Requirements and Water Quality Certification for the Montanera Project, City of Orinda, Contra Costa County.**

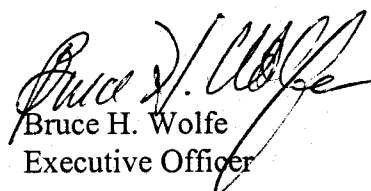
Dear Mr. Olson:

Enclosed please find a copy of the above-reference Order, as adopted by the Board at its June 16, 2004, meeting.

Please note the various required submittals and due dates for reports and plans that are a part of the Order. We look forward to continue to work with you in the development of these reports.

Should you have any questions or further comments, please contact Elizabeth Morrison of my staff at (510) 622-2330 or via email to [emc@rb2.swrcb.ca.gov](mailto:emc@rb2.swrcb.ca.gov).

Sincerely,

  
Bruce H. Wolfe  
Executive Officer

Enclosure: Board Order No. R2-2004-0049

cc (w/ enclosure):

Oscar Balaguer, SWRCB-DWQ  
Molly Martindale, Regulatory Branch, Corps  
Warden Nicole Kozicki, CDF&G, Yountville  
Mike Monroe, US EPA, Wetlands Regulatory Office, WTR-8

Dan Buford, USFWS, Sacramento  
Emmanuel Ursu, City of Orinda  
Tamsen Plume, Beveridge & Diamond, P.C.  
Steve Abbors, EBMUD  
Bob Doyle, EBRPD  
Brad Olson, EBRPD



CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION

ORDER No. R2-2004-0049

WASTE DISCHARGE REQUIREMENTS AND WATER QUALITY CERTIFICATION FOR:

**ORINDA GATEWAY LLC**

**MONTANERA PROJECT, ORINDA, CONTRA COSTA COUNTY**

The California Regional Water Quality Control Board, San Francisco Bay Region, hereinafter Water Board, finds that:

1. Orinda Gateway LLC (d.b.a. Montanera) (hereinafter Discharger) proposes to construct a residential and open space development on a 985-acre site in the City of Orinda (hereinafter Project). The Project consists of the following elements:
  - a. Approximately 245 residential units at varying densities on about 193 acres;
  - b. Approximately 23 acres of community facilities, including community playfields, parks, a community art and garden center, trails and related amenities;
  - c. Dedication of 973 acres as open space (including 768 on-site and 205 in the adjacent Indian Valley), all of which will be placed under conservation easements; and,
  - d. Associated roads, utilities, and other infrastructure.
2. There are approximately 15.34 acres of jurisdictional waters of the United States, including creeks and wetlands, on the Project site that are waters of the State and delineated waters of the United States. The site's waters are comprised of:
  - a. 56,295 linear feet (6.01 acres) of creeks, including 17,100 linear feet of perennial creeks and 39,195 linear feet of intermittent and ephemeral creeks;
  - b. 1.61 acres freshwater seasonal wetlands; and
  - c. 7.72 acres of seep wetlands.
3. The Project will result in the direct placement of several million cubic yards of cut and fill. This activity will permanently fill and/or disturb approximately 4.03 acres of jurisdictional waters of the United States, including 2.66 acres of wetlands, and 1.37 acres (14,254 linear feet) of ephemeral and intermittent creeks on the Project site. The Project will also temporarily disturb approximately 72 linear feet of creeks for the installation of stormwater and keyway subdrain outfalls, which will be installed at the toe of the banks with the minimum amount of rip-rap necessary to prevent erosion.
4. Waters on the Project site serve as habitat for the California red-legged frog (*Rana aurora draytonii*, hereinafter CRLF), a federally-listed threatened species, and as habitat for the Foothill yellow-legged frog (*Rana boylei*, hereinafter FYLF), a federal and state listed

species of special concern. Upland portions of the site serve as habitat for the Alameda whipsnake (*Masticophis lateralis euryxanthus*), a federal and state listed threatened species.

5. **Mitigation Plan:** To mitigate for its permanent fill of 4.03 acres of freshwater wetlands, including 1.05 acres of seeps, 1.61 acres of freshwater seasonal wetlands, and 14,524 linear feet of ephemeral and intermittent creeks, the Discharger will complete the mitigation proposed in its "Resource Management Plan" (hereinafter RMP), dated February 2003 and prepared by Wetlands Research Associates in association with Clearwater Hydrology, P/A Design Resource, Inc., ENGEO Incorporated, and Questa Engineering. The RMP includes the following:

- "Wetland Mitigation and Monitoring Plan for the Montanera Project" (hereinafter Wetlands Plan)
- "Stream and Riparian Habitat Mitigation and Monitoring Plan for the Montanera Project," (hereinafter Stream Plan)
- "Indian Valley Mitigation and Monitoring Plan," (hereinafter Indian Valley Plan)
- Revisions to the RMP made in the Discharger's response to Board staff comments dated October 24, 2003, December 1, 2003 and the Long-Term Land Management Plan for the Montanera Project dated March 30, 2004 (hereinafter RMP Correspondence)
- "Stormwater Management Plan for the Montanera Project, City of Orinda, California" (hereinafter SWMP), prepared by P/A Design Resources, 2nd revision dated October 2003

A Final RMP, including all modifications to the February 2003 RMP made in the RMP Correspondence and this Order, will be completed and submitted to the Water Board for future ease of reference.

The proposed wetland and stream mitigation consists of the following:

- a. Wetlands. As described in the Wetland Plan and Indian Valley Plan, the Discharger will create and restore a total of 5.32 acres (2:1 ratio) of compensatory wetlands on the Gateway and Indian Valley sites to compensate for the 2.66 acres of impacts.

Location	Created Seasonal Wetlands	Re-established Seeps	Preservation of Wetlands and Seeps
Gateway Valley	3.98 acres		6.67 acres
Indian Valley	0.96 acres	0.38 acres	3.23 acres
Total	4.94 acres	0.38 acres	9.90 acres

Re-establishment activities include re-contouring and expanding existing seep wetlands, and additional planting in wetland and buffer areas. Enhancement activities include the management of historic livestock grazing. Limited grazing will only be allowed within wetlands for a limited duration during the dry season to maintain and protect wetland vegetation and reduce fuel loads while protecting habitat and water quality. In order to test the mitigation wetlands, and to offset potential temporal impacts, the Discharger shall construct the following created seasonal "pilot" wetland mitigation sites by October 15, 2004: Mitigation Wetland (MW) 16 and MW 27 & 28 in Gateway Valley and MW 9 in Indian Valley.

b. Streams. As described in the Stream Plan, the Discharger will plant native species to cover a minimum of 12.42 acres of riparian habitat along Brookside, Moraga, and Indian Creeks, and their tributaries and reduce bank erosion and enhance habitat in over 37 acres of avoided riparian habitat in Gateway and Indian Valleys. The Discharger shall also enhance and preserve over 58,000 linear feet within Gateway and Indian Valleys by implementing remedial grading to reduce erosion caused by landslides and managing grazing.

The Discharger will also implement focused streambed and bank restoration measures in the Brookside and Moraga Creeks stream systems at 18 locations, consisting of restoration of historic channels, repair of headcuts, removal of existing culverted road crossings, removal of eroding fire roads, and bed and bank stabilization measures using rock and woody materials. These restoration activities will result in temporary disturbance of 975 ft on Brookside Creek and 300 ft on Moraga Creek. The restoration of two historic channels will result in permanent fill of 260 linear feet of Brookside gully-tributary and 430 lf of a Moraga gully-tributary. This gully fill will route flows from these erosive gullies to restored historic channel.

Finally, as described in the Stream Plan and Indian Valley Plan the Discharger will restore Indian Valley drainages that have been adversely affected by a historic road and berm. Restoration activities include a series of wet crossings and culverts, to create new drainage and stabilize and enhance a portion of the existing drainage, resulting in the creation of 110 linear feet of new watercourses. Stabilization and enhancement of 16,333 linear feet of drainages will occur through enhancement of an existing roadside drainage in Indian Valley, removal of an eroding fire road, culvert removal, riparian plantings, and the elimination of historic grazing from within perennial riparian corridors and management of grazing in upland areas. Such grazing practices are consistent with East Bay Municipal Utility District watershed protection policies to reduce fuel loads while protecting riparian habitat and water quality.

6. **Habitat and Other Resource Management Plans:** In addition to the Stream Plan, Wetlands Plan, and Indian Valley Plan, the Discharger has submitted the following plans as part of the RMP: the "Fuel Management Plan for the Montanera Project," the "Grazing Management Plan for the Montanera Project", the "California Red-Legged Frog Management and Monitoring Plan for the Montanera Project," the "Alameda Whipsnake

Management and Monitoring Plan for the Montanera Project,” the “Foothill Yellow Legged Frog Management and Monitoring Plan for the Montanera Project,” the “Bullfrog Eradication Plan for the Montanera Project,” and the “Long-Term Land Management Plan for the Montanera Project” which describe how the lands are to be managed under the conservation easements. They are acceptable to the Board, with the revisions described in the RMP Correspondence and listed in the Provisions.

7. **Post-construction Stormwater Management:** The Discharger has submitted a “Stormwater Management Plan for the Montanera Project, City of Orinda, California” (hereinafter SWMP), prepared by P/A Design Resources, 2nd revision dated October 2003. This plan is acceptable to the Board, with revisions described in the RMP Correspondence and listed in the Provisions. The plan includes the following measures to address the Project’s post-construction urban runoff impacts:
  - a. Construction of a combination of water quality ponds and one mechanical treatment unit. The water quality ponds would capture and treat stormwater runoff from an area of approximately 202 acres (area B). The combined area for the water quality ponds, detention ponds, and upland access and landscaping will be at least 7.8 acres, which include water quality ponds sufficient to treat 9.06 acre-feet of water with a target minimum detention time of 72 hours, with volume provided for the minimum permanent pools, associated vegetation, and other design standards as set forth in the SWMP. The mechanical treatment unit in area A would capture and treat a development area of approximately 33 acres and will be sized to sufficiently treat 4.29 cubic feet per second. These volumes will comply with the requirement to treat 80-90% of average annual runoff from the Project site.
  - b. Implementation of the site design measures, source control measures, and treatment controls for the Project, as specified in the SWMP.
  - c. Appropriate deed restrictions and a funding mechanism for the O&M of the stormwater system and other BMPs for their lifetime by the Geologic Hazard Abatement District (GHAD).
8. **Conservation Easements:** The wetland and riparian mitigation areas and open space within the protected portions of the Brookside Watershed, including the creek and the creek buffer, the Moraga Creek Watershed, and the Indian Valley property (approx. 973 acres) (“Montanera Preserve Area”) shall be subject to conservation easements pursuant to Civil Code sections 815-816. The easements shall provide in perpetuity for the protection of the Montanera Preserve Area for the purposes of retaining the land in its natural, scenic, and open-space condition. Uses allowed within the Montanera Preserve Area shall be consistent with those purposes as well as maintaining existing fish and/or wildlife resources. Livestock grazing will be restricted to the levels necessary for fuel management consistent with the Grazing Management Plan for the Montanera Project. The Discharger shall submit the conservation easements for the review and approval of the Executive Officer prior to groundbreaking and shall demonstrate that the easements are acceptable to the Conservation Entities that will hold title to the land (see Finding No.

9, below), CDFG, Corps and the USFWS. Upon approval, the easements shall be recorded prior to the completion of construction activities.

a. Holder of the Conservation Easements. During the Initial Monitoring Period, described below in Finding No.9, the conservation easements for the Montanera Preserve Area will be held by a single-purpose, non-profit entity ("Montanera Land Trust") to be formed and funded by the Discharger and governed by an independent board, unless an alternative qualified entity is approved by the Executive Officer, CDFG, Corps, and the USFWS. The Montanera Land Trust shall be organized and operated in compliance with all requirements of § 815.3 of the California Civil Code.

During the long-term management of the Montanera Preserve Area, described below in Finding No.9, the conservation easements will be held by entities satisfying the requirements of § 815.3 of the California Civil Code, which entities may include the East Bay Municipal District, East Bay Regional Park District, and the Montanera GHAD.

**9. Management of the Montanera Preserve Area:**

a. Initial Monitoring Period. The Discharger shall retain ownership of the Montanera Preserve Area for ten years, or until such later time as CDFG, Corps, Water Board and the USFWS find that the Discharger has completed mitigation and monitoring requirements in the RMP ("Initial Monitoring Period").

b. Long-term Management. As described in the Long-Term Land Management Plan for the Montanera Project, the 973-acre Montanera Preserve Area is divided into six management areas:

- Development Buffer Area (+/- 77 acres)
- Quarry Hill Open Space (+/- 61 acres)
- Eastern Hills Open Space (+/- 118 acres)
- Western Hills Open Space (+/- 378 acres)
- Moraga Creek Open Space (+/- 134 acres)
- Indian Valley Preserve (+/- 205 acres)

After the Initial Monitoring Period, the long-term management of the Montanera Preserve Area will be transferred to one of the following Conservation Entities or other entity satisfying the requirements of § 815.3 of the California Civil Code, subject to the approval of the Executive Officer and subject to the terms of the Long-Term Land Management Plan for the Montanera Project, as follows:

- i) East Bay Municipal Utility District (hereinafter EBMUD) has expressed interest in the Indian Valley Preserve, the Moraga Creek Open Space, and potentially the portion of the Western Hills Open Space located south of Zuckerman Saddle to protect and improve water quality in the San Leandro watershed.

- ii) East Bay Regional Park District (hereinafter EBRPD) has expressed interest in the Western Hills Open Space as an expansion of the Robert Sibley Volcanic Preserve.
- iii) A Geologic Hazard Abatement District (Montanera GHAD) formed subject to the conditions described below (or an alternative fee owner approved by the City, EBRPD, CDFG, Corps, Water Board and USFWS prior to transfer) is expected to serve as the long-term manager of the Development Buffer Area, the Quarry Hill Open Space, the Eastern Hills Open Space and potentially any other portion of the Montanera Preserve Area is not accepted by EBMUD or EBRPD.

The final legal boundaries will be established in cooperation with the long-term land managers to create the most practical long-term management units. After title has transferred, the new fee title owner for each management area shall be responsible for implementing the Long-Term Land Management Plan for the Montanera Project.

c. Montanera GHAD: The Montanera GHAD shall conform to the following requirements:

- i) The Montanera GHAD shall be formed by the City of Orinda including the development area and those portions of the Montanera Preserve Area for which the GHAD becomes fee owner. The GHAD is expected to take title to the Development Buffer Area, the Quarry Hill Open Space and the Eastern Hills Open Space (and may take title to any of the remaining management areas if EBRPD and EBMUD do not become the fee title owner of the area). The Montanera GHAD shall fund the ongoing maintenance and monitoring of stormwater management, geologic hazard abatement, and other activities specified in the GHAD Plan of Control ("POC") as approved by the City; and will use the endowment provided by the Discharger (described below) to fund the long-term resource management activities described in the Long-Term Land Management Plan.
- ii) The Montanera GHAD board shall consist of the members of the City of Orinda City Council.
- iii) The Montanera GHAD POC shall include the following:
  - a) The resource agency permits for the project and the final RMP shall be incorporated into the POC (either by reference or attachment);
  - b) The priority list of GHAD expenditures under the POC shall include a list of GHAD activities, and shall list as the top priority the protection of biotic resources and compliance with the RMP as the first priority annual expenditure. Absent emergency slope stabilization measures required to respond to imminent landslide or other geologic hazard abatement threats to occupied structures, no



other tasks on the GHAD priority list under the POC shall take priority over these RMP expenditures;

- c)
- d) The POC shall require that the GHAD manager retain a qualified biologist for contracting intervals of no less than three years to perform the tasks required in the RMP.

10. **Financing: Initial Monitoring Period.** During the Initial Monitoring Period, the Discharger shall fund the construction, management, maintenance and monitoring required under the RMP. The Discharger has submitted an estimate of the cost of RMP implementation and preliminary supporting information to address the revised monitoring periods in the RMP.

This Order requires the Discharger to submit, prior to the start of Project construction, a bond or other appropriate instrument of financial assurance in the amount of \$12,800,000 to fund the mitigation, monitoring and maintenance work during the Initial Monitoring Period. The performance bond or other financial assurance mechanism must provide that if the Discharger fails to complete all or any portion of the work required by this Order, after a cure period which shall not exceed 90 days, the City of Orinda shall be able to draw upon the performance bond for the sums necessary to complete such work; provided that the work must be performed by a qualified biologist with experience at the site (i.e., the biologist under contract to the Discharger) or a qualified biologist with experience at sites with similar riparian, aquatic, and natural resource values.

Reduction of bond amount. Portions of this guarantee may be released upon receipt and approval by the Executive Officer of the completion of elements of the Final RMP prior to the end of the Initial Monitoring Period. However, the amount of the guarantee may not be reduced below \$3,000,000 until the Discharger has completed its Initial Monitoring Period to the satisfaction of the Board and the Discharger has provided evidence that the long-term endowments for the Conservation Entities, (described below) have been funded in full. If the Discharger fails to fund the endowments, the City of Orinda may use the remainder of the guarantee to fund the endowments.

Long-term Management. An endowment fund created by the Discharger shall fund the conservation easement holder's (Montanera Land Trust) costs in monitoring during the Initial Monitoring Period. Separate endowment funds shall fund the Conservation Entities' subsequent long-term costs to implement the grazing management, fuel management, bullfrog eradication, invasive weed control, fence, alternate water source and sign maintenance and property management costs (collectively "long-term resource management activities") described in the Long-Term Land Management Plan.

The Discharger has submitted Property Analysis Record (PAR)-based estimate of the endowment amounts necessary to fund the long-term resource management activities for each of the management areas, in perpetuity. The Discharger shall create a separate endowment fund for each of the Conservation Entities ("Long-Term Resource

Management Endowments”) Before transferring portions of the Montanera Preserve Area to those entities. The final Long-Term Resource Management Endowments amounts will be calculated by the Discharger based on the cost of the last three years of the Initial Monitoring Period, and a final PAR analysis to calculate endowment amounts that will be adequate to fund such actual monitoring and maintenance requirements in perpetuity. The final Long-Term Resource Management Endowments amounts shall be reviewed and approved by the Executive Officer and Conservation Entities. Endowment funding will be distributed among the Conservation Entities in proportion to their respective long-term management responsibilities as determined by the final PAR evaluation. The Discharger has presently estimated that an amount of \$800,000 is appropriate if an endowment mechanism is used to secure long-term funding. This Order requires that the Long-Term Endowments will total at least this amount, unless the Executive Officer and the Conservation Entities approve a lesser endowment amount based on information available as a result of the final PAR evaluation. As described above, the performance bond in the amount of \$3,000,000 will be retained to ensure the funding of adequate long-term endowment funds.

11. On February 4, 2001, the Discharger submitted an initial application for Water Quality Certification and Waste Discharge Requirements for the Project. That application was subsequently completed by additional submittals.
12. The Board has determined to regulate the proposed discharge of fill materials into waters of the State by issuance of Waste Discharge Requirements (WDRs) pursuant to Section 13263 of the California Water Code (CWC) and 23 CCR §3857, in addition to issuing certification pursuant to 23 CCR §3859. The Board considers WDRs necessary to adequately address impacts and mitigation to beneficial uses of waters of the State from this project, to meet the objectives of the California Wetlands Conservation Policy (Executive Order W-59-93), and to accommodate and require appropriate changes over the life of the project and its construction.
13. The Board, on June 21, 1995, adopted, in accordance with Section 13244 et. seq. of the CWC, a revised Water Quality Control Plan, San Francisco Bay Basin (Basin Plan). This updated and consolidated revised Basin Plan was approved by the State Water Resources Control Board and the Office of Administrative Law on July 20, 1995, and November 13, 1995, respectively. A summary of regulatory provisions is contained in 23 CCR 3912. The Basin Plan defines beneficial uses and water quality objectives for waters of the State, including surface waters and groundwaters. This Order is in compliance with the Basin Plan.
14. The subject wetlands, seasonal creeks, and other waters on the Project site are located in the San Pablo and South Bay Basins, and are tributaries to either San Pablo Creek or San Leandro Creek. San Pablo Creek is tributary to the San Pablo Reservoir and San Leandro Creek, including tributaries of Moraga Creek and Indian Creek, is tributary to the Upper San Leandro Reservoir. Both reservoirs are integral parts of EBMUD’s drinking storage system. The Basin Plan does not explicitly designate beneficial uses for waters on the

Project site. However, the Basin Plan states that “[t]he beneficial uses of any specifically identified waterbody generally apply to all of its tributaries.” The following existing beneficial uses defined in the Basin Plan for identified waterbodies are:

- Cold freshwater habitat (San Pablo Creek, San Pablo Reservoir, San Leandro Creek, San Leandro Reservoir)
- Fish migration (San Pablo Creek, San Pablo Reservoir, San Leandro Creek)
- Freshwater Replenishment (San Leandro Creek)
- Non-contact water recreation (San Pablo Creek, San Pablo Reservoir)
- Warm freshwater habitat (San Pablo Creek, San Pablo Reservoir, San Leandro Reservoir)
- Water contact recreation (San Pablo Reservoir)
- Fish spawning (San Pablo Reservoir, San Leandro Creek, San Leandro Reservoir)
- Wildlife habitat (San Pablo Creek, San Pablo Reservoir, San Leandro Creek, San Leandro Reservoir)
- Municipal and domestic water supply (San Pablo Reservoir, San Leandro Reservoir)

Additionally, waters on the Project site provide potential habitat for the preservation of protected species, including breeding and dispersal habitat for the federally listed threatened CRLF and the state-listed species of special concern FYLF.

15. The Basin Plan Wetland Fill Policy (Policy) establishes that there is to be no net loss of wetland acreage and no net loss of wetland value when the project and any proposed mitigation are evaluated together, and that mitigation for wetland fill projects is to be located in the same area of the Region, whenever possible, as the project. The Policy further establishes that wetland disturbance should be avoided whenever possible, and if not possible, should be minimized, and only after avoidance and minimization of impacts should mitigation for lost wetlands be considered.
16. The goals of the California Wetlands Conservation Policy (Executive Order W-59-93, signed August 23, 1993) include ensuring “no overall loss” and achieving a “...long-term net gain in the quantity, quality, and permanence of wetland acreage and values...” Senate Concurrent Resolution No. 28 states that “[i]t is the intent of the legislature to preserve, protect, restore, and enhance California’s wetlands and the multiple resources which depend on them for benefit of the people of the State.” Section 13142.5 of the CWC requires that the “[h]ighest priority shall be given to improving or eliminating discharges that adversely affect...wetlands, estuaries, and other biologically sensitive areas.”
17. This Order applies to the temporary and permanent fill and indirect impacts to waters of the State associated with the Project, which is comprised of the components listed in Finding 1. Construction of the project will result in the permanent placement of fill in and/or disturbance of 4.03 acres of jurisdictional waters, including freshwater seasonal wetlands, seeps, and creeks. The permanent impact of this fill on waters was identified as a potentially significant impact in the certified CEQA documents for the Project

described in Finding No. 22, below.

18. The Discharger has submitted an Alternatives Analysis and supplemental information described in the Staff Report to show that appropriate effort was made to avoid and then to minimize wetland disturbance, as required by the Basin Plan. Board and federal agency staff held extensive additional discussions with the Discharger regarding its Alternatives Analysis. The Board concurs with the conclusions of the Alternatives Analysis, as supplemented.
19. Discharges of storm water associated with construction activity will occur. The CEQA documents certified for the Project identify such discharges, including the pollutants associated with them, as a potentially significant impact. The Discharger is responsible for obtaining appropriate permits for these discharges, including complying with the rules and regulations of National Pollutant Discharge Elimination System (NPDES) permit requirements. This includes complying with the requirements of State Water Resources Control Board Water Quality Order No. 99-08-DWQ, the NPDES General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter General Permit).

Because of the Project's proximity to sensitive resources, including special status species habitat, and potential to discharge materials that could significantly impact those resources, this Order requires the Discharger to submit a Storm Water Pollution Prevention Plan or Plans (SWPPPs) for the Project, prepared pursuant to the provisions of the General Permit, at least 60 days prior to the beginning of construction for the Project.

20. Discharges of ground water or other non-storm water during construction may be required. This Order considers such discharges covered by the General Permit, contingent on submittal of an acceptable discharge plan at least 30 days prior to such a discharge.
21. Discharges of storm water associated with the post-construction operation and maintenance of the Project will occur following its completion. The CEQA documents certified for the Project identify such discharges, including the pollutants associated with them, as a potentially significant impact. The Discharger is responsible for obtaining appropriate permits for these discharges, including complying with the rules and regulations of NPDES permit requirements. This includes complying with the requirements placed on the Project under NPDES Permit CAS0029912 (Order No. R2-2003-0022), the NPDES Municipal Storm Water Permit that covers the City of Orinda. The Discharger has submitted a SWMP for its project that, together with the additional submittals required under this Order, will be consistent with the requirements of NPDES Permit CAS0029912, Provision C.3, the permit provisions addressing new and redevelopment projects.
22. The California Environmental Quality Act (CEQA) requires all projects approved by State agencies to be in full compliance with CEQA, and requires a lead agency to prepare

an appropriate environmental document (e.g., Environmental Impact Report or Negative Declaration) for such projects. The Board finds, after review of the Project's environmental documents, that all environmental impacts have been identified for the project activities which it is required to approve, and that with compliance with the conditions of this order, that mitigation measures and/or alternatives have been incorporated to reduce those impacts to a level of insignificance.

The City of Orinda has certified the following CEQA documents: (1) Final Environmental Impact Report on the Gateway Valley 90/10 Plan (SCH # 91103062), prepared by Mundie & Associates and certified on July 21, 1992; (2) Addendum to the 1992 FEIR, prepared Mundie & Associates and certified on November 15, 1994; (3) Revised Final Supplemental Environmental Impact Report for the Montanera Project in the Gateway Valley, prepared by Wagstaff and Associates and certified on December 1, 1998; (4) City Council Revisions to the 1998 SEIR; and (5) Supplemental Mitigation Monitoring and Reporting Plan, prepared by Wagstaff and Associates and approved by the City of Orinda in March 1999.

23. On September 21, 2001, the U. S. Army Corps of Engineers (Corps) issued a Public Notice for a proposed Individual Permit for the Project (Corps File No. 25790S) pursuant to Section 404 of the Clean Water Act.
24. In November 2003, the United States Fish and Wildlife Service (USFWS) issued a Draft Biological Opinion for the Project (USFWS File No. 1-1-02-F-5) that it is not likely to jeopardize the existence of either the CRLF or the Alameda whipsnake.
25. Pursuant to 23 CCR Sections 3857 and 3859, the Board is issuing WDRs and Water Quality Certification for the Project as described herein.
26. The Board has notified the Corps, City of Orinda, U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Game (CDFG), and other interested agencies and persons of its intent to prescribe WDRs and Water Quality Certification for this discharge.
27. The Board, in a public meeting, heard and considered all comments pertaining to the discharge.
28. This Project file is maintained at the Board under File No. 2118.03(ECM).

IT IS HEREBY ORDERED that Orinda Gateway LLC in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, shall comply with the following, pursuant to authority under CWC Sections 13263 and 13267:

**A. Discharge Prohibitions**

1. The direct discharge of wastes, including rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plains, is prohibited.
2. The wetland fill activities subject to these requirements shall not cause a nuisance as defined in CWC §13050(m).
3. The discharge of decant water from active dredging or fill sites and dredged material stockpile or storage areas to surface waters or surface water drainage courses is prohibited, except as conditionally allowed following the submittal of a discharge plan or plans as described in the Provisions.
4. The groundwater in the vicinity of the Project shall not be degraded as a result of the Project activities or placement of fill for the Project.
5. The discharge of materials other than storm water, which are not otherwise regulated by a separate NPDES permit or allowed by this Order, to waters of the State is prohibited.
6. The discharge of drilling muds to waters of the State, or where such muds could be discharged to waters of the State, is prohibited.

**B. Receiving Water Limitations**

1. The discharges shall not cause the following conditions to exist in waters of the State at any place:
  - a. Floating, suspended, or deposited macroscopic particulate matter or foam in concentrations that cause nuisance or adversely affect beneficial uses;
  - b. Bottom deposits or aquatic growths to the extent that such deposits or growths cause nuisance or adversely affect beneficial uses;
  - c. Alteration of temperature, turbidity, or apparent color beyond present natural background levels;
  - d. Visible, floating, suspended, or deposited oil or other products of petroleum origin; and
  - e. Toxic or other deleterious substances to be present in concentrations or quantities which will cause deleterious effects on wildlife, waterfowl, or other aquatic biota, or which render any of these unfit for human consumption, either at levels created in the receiving waters or as a result of biological concentration.

2. The discharges shall not cause nuisance, or adversely affect the beneficial uses of the receiving water.
3. The discharges shall not cause the following limits to be exceeded in waters of the State at any one place within one foot of the water surface:

- a. Dissolved Oxygen: 5.0 mg/L, minimum

The median dissolved oxygen concentration for any three consecutive months shall not be less than 80% of the dissolved oxygen content at saturation. When natural factors cause concentrations less than that specified above, then the discharges shall not cause further reduction in ambient dissolved oxygen concentrations.

- b. Dissolved Sulfide: 0.1 mg/L, maximum

- c. pH: The pH shall not be depressed below 6.5 nor raised above 8.5, nor caused to vary from normal ambient pH by more than 0.5 pH units.

- d. Un-ionized Ammonia: 0.025 mg/L as N, annual median; and  
0.16 mg/L as N, maximum

- e. Nutrients: Waters shall not contain biostimulatory substances in concentrations that promote aquatic growths to the extent that such growths cause nuisance or adversely affect beneficial uses.

### C. Provisions

1. The Discharger shall comply with all Prohibitions and Provisions of this Order immediately upon adoption of this Order or as provided below.
2. The Discharger shall submit copies of all necessary approvals and/or permits for the Project and mitigation projects from applicable government agencies, including, but not limited to, CDFG, USFWS, City of Orinda, and the Corps prior to the start of construction on that component.

### Project Implementation Deadlines

3. No construction shall commence on any Project component until all required documents, reports, plans, and studies required in the Provisions associated with that component have been submitted to and found acceptable by the Executive Officer. For example, mass grading for the Project may begin, within the timelines of the related Provisions, when the required financial assurance documents, SWPPP, and other documents required in the Provisions have been accepted by the Executive Officer. In all cases where the

Discharger is required to make a submittal acceptable to the Executive Officer, the Executive Officer may determine that construction may begin sooner than the specified number of days for the submittal prior to the beginning of construction.

4. Not later than 90 days prior to the beginning of construction, the Discharger shall submit, acceptable to the Executive Officer, a copy of the Final RMP. Discharger shall comply with the Final RMP, and an implementation schedule for completing the restoration and mitigation work be as follows: (1) in areas unaffected by project grading (i.e., east of Brookside Creek, south of Zuckerman Saddle and Indian Valley) shall be completed by December 31 of the year when existing creeks, tributaries, wetlands and riparian habitats are impacted by pre-development grading for the residential areas, and (2) all work within or directly adjacent to the development area shall be completed within 12 months from the time when grading has been completed for the development area adjacent to the open space area. If the Discharger fails to implement the mitigation (planting or creation) during the required time period, the Discharger shall notify the Executive Officer within 30 days and submit a revised plan for Executive Officer approval for additional mitigation to offset temporal losses. The additional mitigation will include the upsizing of plant material one container size above the originally specified container size for all plants not installed during the required time period, and payment of a monetary donation to a local land trust in an amount equal to the amount of the Discharger's cost to implement the approved mitigation that was not installed during the required time period.
5. By October 15, 2004, the Discharger shall construct the following created seasonal "pilot" wetland mitigation sites: Mitigation Wetland (MW) 16 and MW 27 & 28 in Gateway Valley and MW 9 in Indian Valley. As built plans for these mitigation wetlands shall be prepared and submitted to the Board within 6 weeks of construction. Annual monitoring reports shall be submitted to the Board by June 15 of each monitoring year, as per the Final RMP and until the monitoring of the entire mitigation sites has begun, at which time the "pilot" wetlands will be included in those annual monitoring reports.
6. As-built plans for the mitigation sites shall be prepared and submitted to the Board within 12 weeks of the completion of mitigation site construction.
7. Annual monitoring reports shall be submitted to the Board by September 15 of each monitoring year, as per the Final RMP, and until the sites have met their performance standards and final success criteria and the Executive Officer has accepted a notice of mitigation completion for each site. Monitoring reports shall be prepared as described in the Final RMP.
8. Not later than 60 days prior to the beginning of construction, the Discharger shall submit the draft conservation easements that identify, among other things, the entity or entities that will hold those easements after the Initial Monitoring Period. The Discharger will also identify the Conservation Entities that will hold title to and be responsible for the six management areas that constitute the Montanera Preserve Area described in Finding No. 9. Upon the Executive Officer's acceptance of the draft easements, the Executive Officer



may determine that work may begin sooner than 60 days after submittal of the easements. The conservation easements shall be in a form acceptable to the Executive Officer, the Conservation Entities that will hold title to the land (see Finding No. 9), CDFG, Corps, and USFWS. These conservation easements shall be recorded prior to the completion of construction activities. The conservation easement holder(s) may be EBMUD, EBRPD, the Montanera GHAD or other entity satisfying the requirements of § 815.3 of the California Civil Code. The Long-Term Resource Management Endowments described in Finding No.10 shall be created before the Discharger transfers title to the Conservation Entities. The City of Orinda shall have the right to call the performance bond described in Finding No. 10 to ensure the funding of the Long-Term Resource Management Endowments.

9. Not later than 60 days prior to the beginning of construction, the Discharger shall submit, acceptable to the Executive Officer, a final SWMP that complies with the SWMP included in the Final RMP. The final SWMP shall include the following:
  - a. Final designs for the proposed water quality ponds, mechanical treatment unit, and other physical treatment BMPs, and a schedule for the ponds' construction and completion, not less than 24 months after the beginning of Project construction, or after the development of at least 60 percent of 'the Project (streets and utilities in place and building pads graded), whichever occurs first. This shall also include an Operations and Maintenance (O&M) plan, as described in the SWMP, that addresses O&M for the physical BMPs;
  - b. Submittal of finalized Storm Water Quality Deed Restrictions for the stormwater system and proposed funding amounts sufficient to ensure the appropriate O&M of the stormwater system and other BMPs for their lifetime by the GHAD.
10. Not later than 60 days prior to the beginning of construction, the Discharger shall submit, acceptable to the Executive Officer, a performance bond in the amount of \$12,800,000, or upon approval by the Executive Officer, an alternative financial assurance mechanism or an alternative amount, adequate to ensure the success of the Final RMP, including proposed creek and wetland mitigation and funding sufficient to ensure the appropriate O&M of the SWMP as described in Provision No. 9.
11. Not later than 60 days prior to the beginning of construction of any project component, the Discharger shall submit, acceptable to the Executive Officer, a final SWPPP, substantially consistent with the SWPPP included in the RMP, to address the Project's expected construction stage impacts.
12. Any substantive changes to the Final RMP referenced in the Provisions must be approved in writing by the Executive Officer.

Contingency Measures

13. If the proposed mitigation, including the "pilot" seasonal wetlands, does not achieve performance criteria after a reasonable portion of the monitoring period, even after remedial measures have been implemented, the Discharger shall initiate efforts to define alternative mitigation at an offsite parcel as necessary to accomplish the goals of the Final RMP.

Notice of Mitigation Completion

14. When the Discharger has determined that an area of the mitigation (i.e., Indian Valley, Moraga Creek watershed, Brookside Watershed) has achieved the performance standards and final success criteria specified in the Final RMP it shall submit a notice of mitigation completion (notice), acceptable to the Executive Officer. The notice shall include a status report on the implementation of the long-term maintenance and management portion of the Final RMP and a description of the status of the mitigation component that has been determined to be successful. After acceptance of the notice in writing by the Executive Officer, the Discharger's submittal of annual mitigation monitoring reports for that mitigation component is no longer required.

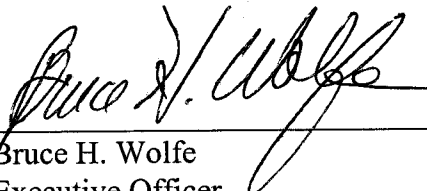
Other Provisions

15. All reports pursuant to these Provisions shall be prepared under the supervision of suitable professionals registered in the State of California, if such registration is required or offered in the profession of the subject field.
16. The Discharger shall immediately notify the Board staff by telephone whenever an adverse condition occurs as a result of this discharge. Such a condition includes, but is not limited to, a violation of the conditions of this Order, a significant spill of petroleum products or toxic chemicals, or damage to control facilities that would cause noncompliance. Pursuant to CWC §13267(b), a written notification of the adverse condition shall be submitted to the Board within two weeks of occurrence. The written notification shall identify the adverse condition, describe the actions necessary to remedy the condition, and specify a timetable, subject to any modifications by the Board staff, for the remedial actions.
17. Should discharges of otherwise uncontaminated ground water contaminated with suspended sediment or other non-storm water that has accumulated in utility trenches or other portions of the Project be required, where such discharges are not otherwise covered by an applicable NPDES permit, such discharges may be considered covered by the General Permit, following the Discharger's submittal of a discharge/treatment plan, acceptable to the Executive Officer, at least 30 days prior to such a discharge.
18. The Discharger shall notify the Board in writing at least 30 days prior to actual start dates for each Project component (i.e., prior to the start of grading or other construction activity

- for any Project component, including the creek and wetland mitigation components).
19. The Discharger shall at all times fully comply with the engineering plans, specifications, and technical reports submitted with its application for water quality certification and the completed report of waste discharge.
  20. The Discharger is considered to have full responsibility for correcting any and all problems that arise in the event of a failure that results in an unauthorized release of waste or wastewater.
  21. The discharge of any hazardous, designated or non-hazardous waste as defined in Title 23, Division 3, Chapter 15 of the California Administrative Code, shall be disposed of in accordance with applicable state and federal regulations.
  22. The Discharger shall remove and relocate any wastes that are discharged at any sites in violation of this Order.
  23. In accordance with CWC §13260, the Discharger shall file with the Board a report of any material change or proposed change in the ownership, character, location, or quantity of this waste discharge. Any proposed material change in operation shall be reported to the Executive Officer at least 30 days in advance of the proposed implementation of any change. This shall include, but not be limited to, all significant new soil disturbances, all proposed expansion of development, or any change in drainage characteristics at the Project site. For the purpose of this Order, this includes any proposed change in the boundaries of the area of wetland/waters of the United States to be filled.
  24. The following standard conditions apply to this Order:
    - a. Every certification action is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to CWC §13330 and 23 CCR §3867.
    - b. Certification is not intended and shall not be construed to apply to any activity involving a hydroelectric facility and requiring a Federal Energy Regulatory Commission (FERC) license or an amendment to a FERC license unless the pertinent certification application was filed pursuant to 23 CCR §3855(b) and that application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought.
    - c. Certification is conditioned upon total payment of any fee required pursuant to 23 CCR §3833 and owed by the Discharger.
  25. An annual fee for Waste Discharge Requirements pursuant to Section 13260 of the California Water Code is required.

26. The Discharger shall maintain a copy of this Order at the Project site so as to be available at all times to site operating personnel and agencies.
27. The Discharger shall permit the Board or its authorized representative at all times, upon presentation of credentials:
  - a. Entry onto Project premises, including all areas on which wetland fill or wetland mitigation is located or in which records are kept.
  - b. Access to copy any records required to be kept under the terms and conditions of this Order.
  - c. Inspection of any treatment equipment, monitoring equipment, or monitoring method required by this Order.
  - d. Sampling of any discharge or surface water covered by this Order.
28. This Order does not authorize commission of any act causing injury to the property of another or of the public; does not convey any property rights; does not remove liability under federal, state, or local laws, regulations or rules of other programs and agencies; nor does this Order authorize the discharge of wastes without appropriate permits from other agencies or organizations.
29. The Board will consider rescission of this Order upon Project completion and the Executive Officer's acceptance of notices of completion of mitigation for all mitigation, creation, and enhancement projects required or otherwise permitted now or subsequently under this Order.

I, Bruce H. Wolfe, Executive Officer, do hereby certify that the foregoing is a full, complete, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on June 16, 2004.

  
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Bruce H. Wolfe  
Executive Officer